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No. 77-1543

In the Supreme Court of the United States

OCTOBER TERM, 1978

KENNETH E. POWELL, PETITIONER

v.

CARGILL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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1. Petitioner, a longshoreman for 17 years, was injured while unloading grain from a railroad car at respondent Cargill's dockside terminal in Portland, Oregon. At the time of his injury, petitioner had worked for Cargill at its grain exporting facility for approximately seven months. He had been hired as a "key man," which meant that he could perform a variety of tasks involved in the operation and maintenance of the grain handling equipment at the terminal.[1] During most of the time he worked for Cargill, he was involved in unloading grain from incoming rail cars. After the grain was removed from the rail cars, it would either be loaded directly onto waiting ships or be stored for subsequent loading (Pet. App. 4-6).

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[1]Petitioner's work as a "key man" at Cargill did not include work aboard the ships. That work was performed by an independent stevedoring company (Pet. App. 5, 27).

Following his injury, petitioner filed a claim for workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. and Supp. V) 901 *et seq.* The administrative law judge denied his claim on the ground that petitioner was not engaged in maritime employment at the time of his injury and was therefore not an "employee" within the meaning of Section 2(3) of the Act, 33 U.S.C. (Supp. v) 902(3) (Pet. App. 35-46). The Benefits Review Board reversed (Pet. App. 23-34). In the Board's view, petitioner's task of unloading grain from railroad cars at the terminal was the first step in a longshoring operation and thus was "maritime employment" within the meaning of Section 2(3).

A divided panel of the court of appeals reversed the Board's decision (Pet. App. 3-22). The court held that even though petitioner was injured at the situs of longshoring operations—within Cargill's marine terminal—he was not engaged in maritime employment. His rail car unloading work, the court held, was "more oriented to the rails than to the sea" (*id.* at 13), and he therefore was not "engaged in longshoring operations" so as to qualify for benefits under the Act. The dissenting judge, concluding that petitioner's claim was controlled by this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, would have affirmed the Board.

2. The Director of the Office of Workers' Compensation Programs believes that the court of appeals erred in reversing the decision of the Benefits Review Board. First, both the Director and the Benefits Review Board are of the view that all physical cargo handling activity within a marine terminal area is "maritime employment" within the meaning of Section

2(3) of the Act, and employees engaged in those activities are therefore covered by the Act.[2] Under this test petitioner's employment was "maritime," and he is eligible for benefits.

Second, the decision below is inconsistent with *Caputo*. The Court there held that Caputo was covered by the provisions of the Act because as a matter of occupation he was a "longshoreman" who spent at least some of his time in indisputably longshoring activities. 432 U.S. at 273. Because Caputo was regularly a member of a stevedoring gang and on the day of his injury was working as a terminal laborer who could have been assigned to "any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation" (*ibid.*), the Court concluded that providing coverage only when he was actually engaged in longshoring operations would defeat the intent of Congress (*id.* at 274).[3]

In seeking to distinguish petitioner's case from Caputo's, the court of appeals noted that Caputo was subject to assignment to a number of different tasks in the terminal in a single workday, while petitioner had worked mainly at the rail unloading site during his employment with Cargill. But even on a narrow reading of this Court's opinion in *Caputo*, this distinction is unsatisfactory. Petitioner was a longshoreman by trade, and Cargill hired him in that capacity. Moreover, he was hired as a "key

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[2]See Brief for Federal Respondent, p. 20, *Northeast Marine Terminal Co.* v. *Caputo, supra.* The Court in *Caputo* declined to pass on whether this is the correct test for "maritime employment." See 432 U.S. at 272-273.

[3]The Court reviewed in detail the effect of the 1972 amendments to the Act, which expanded the Act's coverage to include employment injuries sustained in waterfront land areas by workers engaged in "maritime employment."

man" to do any work within the terminal elevator premises, including pulling grain from storage and directing it out of a spout into ships' holds. Although the record reflects that he was usually assigned to the task of unloading the incoming rail cars, he had at times been assigned to pull grain from storage for loading into waiting ships, and he was subject to being assigned to such work at any time. In analyzing Caputo's work assignment scheme, this Court did not rely on any actual variation in Caputo's duties but found dispositive the fact that he was subject, by the nature of his employment, to being assigned at any time to tasks that indisputably constituted "longshoring operations." Petitioner, a longshoreman by trade and by the terms of his hiring, was subject to a similar variety of assignments, even if he spent most of his time unloading grain cars at the terminal facility.

Finally, the decision of the court of appeals conflicts with *P.C. Pfeiffer Co.* v. *Ford* and *Ayers Steamship Co.* v. *Bryant*, reported *sub nom. Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (C.A. 5), vacated and remanded, 433 U.S. 904, adhered to on remand, 575 F. 2d 79.

In *Bryant*, the court held that the Act covers a cargo handler who, although not denominated a longshoreman, unloaded cotton from wagons at a warehouse immediately adjacent to a pier. As in the instant case, the goods were generally stored in the warehouse until, at some later time, members of stevedoring gangs loaded the goods onto waiting vessels. 539 F. 2d at 544. In *Ford* the court held that the Act covers an employee who was injured while loading a rail car in the waterfront area with cargo that had previously arrived on a seagoing vessel. This work, the court held, was "an integral part of the process of moving maritime cargo from a ship to land transportation," and it therefore fell within the

coverage of the Act, 539 F. 2d at 543. The work of the cargo handlers in *Bryant* and *Ford* was thus identical in every important respect to petitioner's work. There is one difference, however: petitioner was a longshoreman by trade, and Bryant and Ford were not. If there is to be any difference in the judicial treatment of the cases, that difference should be in petitioner's favor.

It is our outderstanding that a petition for a writ of certiorari will be filed in *Ford* and *Bryant*. Because we believe that the decision in the instant case is irreconcilable with the decision of the Fifth Circuit in *Ford* and *Bryant*, we suggest that the Court hold this case for consideration together with *Ford* and *Bryant*, and that the Court grant review in one or more of these cases to resolve this important issue that has divided two major deep-water circuits. It may be advantageous for this Court to hear *Ford* and *Bryant* instead of the present case; because neither Ford nor Bryant was a longshoreman by trade, those cases would allow the Court to resolve the question it reserved in *Caputo* (see pages 2-3, *supra*, and note 2). That decision can be made best, however, after the petition in *Bryant* and *Ford* has been filed.

Respectfully submitted.

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